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IN THE

Supreme Court of the United States

October Term, 1964
No. 531

CLIFFORD JUNIOR THOMAS,

Petitioner,

vs.

THE STATE OF CALIFORNIA, THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR.

Petition for Certiorari to the State of California and the District Court of Appeal of the State of California, Second Appellate District, Division Four.

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THE STATE OF CALIFORNIA, THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR,

Petition for Certiorari to the State of California and the District Court of Appeal of the State of California, Second Appellate District, Division Four.

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

Petitioner, Clifford Junior Thomas, respectfully prays for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Four, and to the State of California, in order to review its judgment affirming a judgment of the Superior Court of the County of Los Angeles, State of California, adjudging petitioner guilty of a violation of Section 12090 of the Penal Code of the State of California (obliteration of identification marks on a revolver and with violation of Section 12021 Penal

Code of the State of California (possession of a revolver by a person previously convicted of a felony, to wit, burglary in the State of Washington on September 2, 1953).

Opinions Below.

The Trial Court delivered no written opinion upon the rendering of judgment [C. T. 15] nor at the time of sentencing [C. T. 15].

The record below consists of the Reporter's Official Transcript of the proceedings at the time of trial, and the Clerk's Transcript, which contains the information, the minutes relating to plea, the minutes concerning the trial, the minutes concerning the motion to suppress, and the verdict of the court and the judgment, and the notice of appeal.

Together with a copy of the petition for rehearing in the District Court of Appeal, a copy of the petition for hearing filed by the defendant, your petitioner, in the Supreme Court of the State of California, the petition for rehearing in the District Court of Appeal was denied without comment. The petition for hearing in the Supreme Court of the State of California was denied.

The judgment of the court below, namely, the District Court of Appeal, and its opinion, attached hereto in the appendix and marked Exhibit "A". It was entitled, the People, plaintiff and respondent, versus Clifford Junior Thomas, defendant and appellant, District Court of Appeal, Second District, Second Criminal 9030, filed June 22, 1964, and by a special order attached to the opinion, the following notation appears (certified for nonpublication). "Under the rules of

this Court, if the Court deems it proper, an opinion may be certified for nonpublication. It, therefore, does not appear in the regular reports." A copy of the opinion, as we have heretofore stated, is attached hereto as Appendix "A", and a copy thereof is attached to the official Clerk's record from the District Court of Appeal, Second Appellate District, State of California.

The opinion of the District Court of Appeal attached hereto in the appendix and just hereinabove referred to closes in the last paragraph with this statement: "The judgment of conviction is affirmed and the purported appeal from the order denying defendant's motion for new trial is dismissed. Jefferson *J.*

We concur:

Burke, *P. J.*
Kingsley, *J.*"

With the following notation: "Certified for nonpublication in the Official Reports pursuant to Rule 976.

Burke, *P. J.*
Jefferson, *J.*
Kingsley, *J.*"

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry here is June 22, 1964. The judgment and opinion of the Court below is attached hereto as Appendix "A", and a copy thereof appears in the record certified to by the Clerk of the District Court of Appeal.

2. The date of the order denying the motion for rehearing in the District Court of Appeal is July 9, 1964 (see record on appeal), minutes District Court of Appeal, 128 A. C. A. No. 2 Minutes page 6 of Minutes.

3. The petition for hearing in the Supreme Court of the State of California was denied August 20, 1964 (see copy of order in the Clerk's record on appeal). (See also Minutes of the Supreme Court for August 20, 1964. 61 A. C. No. 16, page 2 of Minutes.)

4. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari are 28 U. S. C. 1257(3), and Rule 22(1) of this Court.

The matter came back to the Superior Court of the State of California, in and for the County of Los Angeles, for execution of the judgment and the petitioner was granted 60 days from September 1, 1964, within which to complete this application to this court for certiorari.

Questions Presented for Review.

1. *Was the search of an automobile and the trunk thereof in possession of petitioner by officers who had neither a warrant of arrest or search warrant lawful?*

There was no information in the possession of the officers at the time they stopped the appellant and searched the car that he had actually committed a crime of any kind. They had no information from any reliable informant.

California after nearly half a century adopted the exclusionary rule in a most salutary decision.* The reasoning and wisdom of *People v. Cahan, supra,* has been approved by this Court in *Elkins v. United States,* 364 U. S. 206 (1960). Subsidiary to this point is the question of whether or not the petitioner having been stopped, ordered out of his automobile, and while being patted down, could have possibly given consent to a search of the trunk freely and voluntarily under those circumstances, especially where he denies consent was given. Can the State turn its back on a long line of decisions adopting the exclusionary rule? We contend it cannot now, in the face of the latest decisions of this Court making the exclusionary rule "mandatory upon the States."

Constitutional Provisions and Statutes Involved.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . No State shall . . . deprive any person of life, liberty or property without due process of law."

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreason-

*People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905.

able searches and seizures shall not be violated and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Section 12090 of the Penal Code of California provides:

"Any person who changes, alters, removes or obliterates the name of the maker, model, manufacturer's number or other mark of identification, including any distinguishing number or marks assigned by the State Bureau of Criminal Identification and Investigation on any pistol or revolver without first having secured written permission from the Bureau to make such change, alteration or removal, shall be punished by imprisonment in the State Prison for not less than one year nor more than five years."

Section 12021 of the Penal Code of California provides: "Any person who is not a citizen of the United States, and any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other State, Government or country, or who is addicted to the use of any narcotic drug, who owns or has in his possession or under his custody or control any pistol, revolver, or other fire arms capable of being concealed upon the person, is guilty of a public offense, and shall be punishable by imprisonment in the State Prison not exceeding five years, or in the County Jail not exceeding one year, or by fine not exceeding $500.00, or by both."

Statement of Facts Pertinent to This Petition.

On February 25, 1962, Los Angeles Police Officers Dillon and Dankworth received information over the radio in their police car that certain robbery suspects were in the vicinity of Burbank and Whitsett Streets in a white and brown DeSoto automobile, license number W 46096 [R. T. 12]. This radio call was directed to all units in the area [R. T. 18]. When the officers reached that vicinity, they saw a car having the license plates and coloring described over the air [R. T. 8-12]. It was moving southbound on Whitsett approaching Burbank. The car turned right on Burbank and went approximately half a block [R. T. 8-9]. The officers stopped the car by the red lights on the police vehicle [R. T. 9]. Appellant was driving; Gallagher was in the right front seat [R. T. 9]. Officer Dillon and Officer Dankworth got out of the police car and came up to appellant's vehicle [R. T. 19]. Officer Dillon was on the passenger's side, Officer Dankworth was on the driver's side; they did not have their guns drawn [R. T. 19-20]. They walked up to the car together. The officers questioned the men in the car [R. T. 14-15]. They asked to see appellant's drivers license [R. T. 20]. Appellant said he was looking for a girl friend's house, some girl that he knew in this area. Gallagher said he was with appellant, that he just came along for the ride [R. T. 14]. They said they had come from Reno, Nevada, and had just arrived in Los Angeles [R. T. 15]. They said they had picked up a hitchhiker between Bakersfield and Fresno [R. T. 15]. They said they had stopped at the location (Burbank and Whitsett) to get something to eat; they had gone

into the market and obtained cheese and crackers which they ate while sitting in the car [R. T. 16].

Within 30 seconds after the officers approached the car they ordered the two men out and had them place their hands on the roof of the car. The men were "patted down at that time" [R. T. 21]. Another police car containing Officers Norby and Hampton arrived on the scene within two or three minutes [R. T. 22].

Officers Dillon and Dankworth continued to talk to the two men until the other police car arrived [R. T. 24]. Appellant told them that he was driving when they picked up the hitchhiker.

Officer Dillon noticed a pair of binoculars under the right front seat and two walkie-talkie (two-way radios) in the glove compartment [R. T. 16, 68]. He asked appellant, in the presence of Gallagher, if he could look through the car [R. T. 16]. Officers Norby and Dankworth were also present [R. T. 17]. Appellant said, "Sure, go ahead." [R. T. 17, 30, 33, 67, 72, 91].

This the appellant denied, stating that he rolled the window down, after being stopped by the officers, who asked for his drivers license; he showed it to them. The officer then said, "Get out of your car." He got out; the officer told him to put his hands on top of the car. The officer "patted him down" [R. T. 35]. The officer then told Gallagher to get out. The other officer had his pistol on Gallagher; Gallagher was searched [R. T. 36]. After he and Gallagher were searched, one of the officers said to him, "Where's your car keys?" [R. T. 36, 37]. Thomas replied, "They are in the ignition." The officer got in the front of the car, grabbed the keys and went through the trunk [R. T. 37]. He

opened the trunk; Gallagher was present. He stated that he did not at any time give either of the officers consent to open and search the trunk of the vehicle or search the vehicle [R. T. 37]. The officer stated that appellant told him that everything in the car belonged to him [R. T. 91].

Sergeant Lovold testified he was attached to the Burglary Division, Police Department, City of Los Angeles, and was one of the investigating officers; he had talked with defendant Thomas, and in the course of his discussion he asked Thomas about the 357 Magnum and the .32 caliber revolver that were found in the car. He told Thomas these had been removed from the car, and Thomas stated that he had never seen them before [R. T. 115, 116]. The officer testified that in the trunk they found two socks each containing a revolver [R. T. 88]; one revolver was loaded [R. T. 88]; ammunition was found in the trunk; the serial numbers had been removed from the guns [R. T. 78-99].

Some of the officers testified they found numerous burglar tools, including a drill, press, crowbars, ply bar, hammer, screw driver, and wrenches [R. T. 73, 109]; there were several pairs of gloves, cold chisels, a sledge hammer, a brace and bit, and an expansion bit [R. T. 109].

The Defense.

The defense called Mr. Marudas on the issue of probable cause. He testified that about 7:30 in the evening he first observed the De Soto automobile parked across the street from Pepper's Market, at Burbank and Whitsett, in North Hollywood [R. T. 47]. It was on the lot adjacent to the Alpha Beta Market and was

parked over 150 feet away from any other vehicle. The Alpha Beta Market was lit up, but locked. He then drove across to Pepper's Market and stayed in there a good ten minutes [R. T. 48, 49]. When he came out the De Soto was still parked. It was facing Pepper's Market [R. T. 49]. The De Soto automobile started up with the lights out, backed up, then turned right and went north on the parking lot about 150 to 200 feet to the back end of the lot where it parked near three or four other cars [R. T. 49].

Mr. Marudas then went to a telephone and called Pepper's Market [R. T. 49]. He told John Edwards, the manager, that there was a car across the street which looked suspicious to him and suggested that Mr. Edwards take his apron off and come over to look at the car. Mr. Edwards came running over; the automobile drove off [R. T. 49]. Mr. Marudas and Mr. Edwards had a conversation about what course of action to take. Mr. Marudas suggested that if the car returned that Mr. Edwards should call the police [R. T. 50].

While Mr. Edwards was talking to Mr. Marudas, the De Soto came up Whitsett Avenue and came through the alley. It stopped immediately in the parking lot and then drove off [R. T. 56].

Mr. Edwards then telephoned the police [R. T. 56].

About ten minutes later the police car drove into the Alpha Beta lot. Mr. Marudas whistled. The police car came over to him and he said, "The car just went around the corner that you're looking for" [R. T. 51].

At the trial, Mr. Marudas was examined as to whether or not he had testified on page 38, lines 12 through 14, of the Preliminary transcript, as follows:

"Q. You did not, your only—your only conversation with the officers was after the vehicle had been stopped? A. *That's correct*" [R. T. 54] (emphasis ours).

The police car drove off and stopped the De Soto about 150 to 200 feet away [R. T. 51].

Appellant testified on the issue of probable cause. He said that he was in the vicinity of Whitsett and Burbank, driving a 1953 DeSoto bearing Nevada plates when he was stopped by the police [R. T. 34]. Defendant Gallagher was with him at the time [R. T. 35]. He said they were both ordered to get out of the car and that Gallagher was searched by an officer who had his gun drawn at the time. That after both men were searched the officers asked for the car keys. He said they were in the ignition. That an officer got in the front of the car, looked in the "jockey box," under the front seat, in the rear seat and the trunk. He said that he did not give either of the officers consent to make the search [R. T. 36, 37]. He said the officer never asked him if he could search the car, but just asked, "Where's your keys?" He said he told the officers the keys were "in the ignition of the car" [R. T. 41].

Gallagher said he never heard any officer ask appellant for consent to search the car [R. T. 46].

Appellant and Gallagher each testified that he had been previously convicted of a felony [R. T. 39, 44]. Appellant was convicted of burglary in Washington in 1953 [R. T. 40]. Gallagher was convicted of burglary in Montana in 1959 [R. T. 44].

Statement of the Case.

How the Federal Questions Were Raised.

(A) In the preliminary examination and before the committing magistrate. The preliminary hearing was held in the Municipal Court of Los Angeles Judicial District, County of Los Angeles, on March 29, 1962, and at page 18 of the Preliminary Transcript, which is to be found in the Court's record, at the time the exhibits were offered by the Deputy District Attorney, the following occurred:

> "Mr. Pregerson: (Deputy District Attorney) May People's Exhibits heretofore marked for identification be received in evidence?
>
> Mr. Foley: (Counsel for the defendant-petitioner) Objection, Your Honor. I will object on the ground of improper foundation; further object on the ground that the weapons were turned up as a result of an unlawful search and seizure. There is no showing of reasonable and probable cause."

The lower court, at the preliminary examination, first sustained the objection, then took further evidence at the suggestion of the Deputy District Attorney and then admitted the exhibits over objection.

(B) At the Trial court a jury had been selected and after the selection of the jury, certain exhibits, including a revolver, were marked for identification. Counsel for your petitioner then stated:

> "Mr. Foley: That's correct, Your Honor, and I believe at this time getting into the area of consent testimony and I think this goes to the overall issue of probable cause and/or consent for the search. Perhaps it would be proper at this time to go into it in the absence of the jury" [R. T. 10, a part of the Clerk's record herein].

Thereafter, considerable testimony was offered on the issue of probable cause and/or consent for the search and relating to the unlawful search, as set forth in the Statement of the Evidence herein. (The Officers had Neither a Warrant for Arrest or a Search Warrant.)

Commencing at page 57 of the Reporter's Transcript of the proceedings at the trial, counsel for the defendant-petitioner again objected to the admission in evidence of the exhibits alleging that there was an unlawful search and seizure. The Court heard argument on the subject. The motion was by the Court denied with the statement that the motion could be renewed at the time the evidence was presented [p. 65 of Reporter's Transcript of the proceedings at the trial].

When the exhibits were offered in evidence, the same objection previously stated was made, and was by the Court overruled [R. T. 119].

The defendant-petitioner Thomas made a motion for new trial and urged the search and seizure point again [p. 123, Reporter's Transcript of the proceedings at the trial].

(C) The search and seizure question was again raised on the motion for new trial, as just indicated.

(D) The question of search and seizure was raised on appeal before the District Court of Appeal, and by that Court denied, as is indicated by the opinion of the District Court of Appeal filed in the Clerk's record, and a copy of which is attached to this petition as Exhibit "A".

(E) The search and seizure question and the lack of consent was again raised before the Supreme Court of the State of California, as is indicated by the Petition for Hearing in the Supreme Court, a copy of which is included within the record herein.

ARGUMENT.

I.

Hearing Should Be Granted to Determine Whether or Not the Search of the Automobile and the Trunk Thereof in Possession of Petitioner by Officers Who Had Neither a Warrant of Arrest or Search Warrant Was Unlawful and in Violation of the Rules Laid Down, Not Only in California but by This Court.

We will not here repeat the evidence, for we have summarized it we believe, fairly, but the mere fact that the officers had been alerted to lookout for a robbery suspect in the light of this evidence did not warrant the unlawful search of the automobile and the contents of the trunk, especially in view of the fact that when the car had been stopped and the defendants ordered out they were actually in custody, for an arrest takes place when the liberty of anyone is restricted or when one is seized and held by the officers.

Henry v. United States, 368 U. S. 98.

While the petitioner was standing by the side of the car, under direction of the officers with his hands upon the top of the car, they asked for the keys to the trunk. While they contend the petitioner consented to the search, he denies it, and he was in no position to resist the search under any circumstances. He stated that the keys were in the ignition [R. T. 36-37]. This was after he and Gallagher, the co-defendant, had been searched, after he had been "patted down." [R. T. 35, 36]. The officer got in the front of the car, grabbed the keys, and went through the trunk. He opened the trunk. Gallagher, the co-defendant, was present; he stated that he did not at any time give either of

the officers consent to open and search the trunk of the car [R. T. 37]. The officers testified they found burglar tools and revolvers [R. T. 115, 116, 78, 88, 99]. In the trunk. Petitioner testified on the issue of probable cause, that he was in the vicinity of Whitsett and Burbank Streets and was stopped by the police [R. T. 34]. Both were ordered to get out of the car, Gallagher was searched by an officer who had a gun drawn; that after both men were searched the officers asked for the car keys. He said they were in the ignition. Then an officer got in the front of the car, looked in a box under the front seat, the rear seat, and the trunk. Petitioner stated he did not give either of the officers consent to make the search [R. T. 36, 37]. He stated the officer never asked if he could search the car, but just asked, "Where's your keys?" He told the officer the keys were in the ignition [R. T. 41].

That the petitioner was prejudiced by the action of the officers, there is no doubt, for the evidence which was seized from the car was used by the People to make the case. California having adopted the exclusionary rule has in many cases disapproved of such searches.

In *People v. Boyles*, 45 Cal. 2d 652, 656, 290 P. 2d 535, the Supreme Court of this State held:

> "Reasonable cause to justify an arrest may consist of information obtained from other and is not limited to evidence that would be admissible at the trial on the issue of guilt.
>
> "Accordingly, the question presented is whether the information given by the unidentified man to the Chief of Police and passed on to Officer Sunday was sufficient in the light of the other evidence to constitute reasonable cause to believe that

defendant was guilty of a felony, although information provided by an anonymous informer is relevant on the issue of reasonable cause in the absence of some pressing emergency. (See *People v. Kilvington*, 104 Cal. 86, 92, 93, 37 Pac. 799.) An arrest may not be based solely on such information. (See *United States v. Kind*, 87 Fed. 2d 315, 316; *United States v. Blich*, 45 Fed. 2d 627, 629; *United States v. Keown*, 19 Fed. Supp. 639; *State v. Arregui*, 44 Idaho 43, 254 Pac. 788, 793, 794, and citing other cases)".

Evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable.

People v. Boyles, 45 Cal. 2d 291, 290 P. 2d 535; *Wilson v. Superior Court*, 46 Cal. 2d 291, 294, 295.

This record shows beyond question of a doubt that neither Edwards nor Marudas (informants) had any prior information that a crime had been committed, and their information did not justify the arrest of the defendant-petitioner and the search. The most that could have been done, we contend, was "to pat him down."

See also:

People v. Gale, 46 Cal. 2d 253, 294 P. 2d 13;

People v. Mickelson, 59 Cal. 2d 448, at 454.

We now know since *Mapp v. Ohio*, 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1694, that the basic constitutional rules are binding upon the States.

Our contention in this regard is fully affirmed now in the case decided June 15, 1964, *Malloy v. Hogan*,

No. 110, October Term, Supreme Court, 1963, 378 U. S. 1.

We contend there was no probable cause for the search of the automobile, and after the officers had looked in the car and "patted down" the petitioner, there was no occasion to look for weapons or anything else, for they had no reason therefor. The arrest without probable cause and the search of the trunk cannot be justified by what it turned up. California cases so holding are:

People v. Brown, 45 Cal. 2d 640;
Tompkins v. Superior Court, 59 Cal. 2d 65;
People v. Gale, 46 Cal. 2d 253, *supra.*

United States Supreme Court cases so holding are:

Johnson v. United States, 333 U. S. 10;
United States v. Di Re., 332 U. S. 581.

As late as August 21, 1964, the Supreme Court of California, in *People v. Burke,* citing Federal cases as authority, reversed a conviction obtained as a result of an arrest and a search of the trunk of a car without either a warrant of arrest or a search warrant, and we respectfully adopt the portion of the Supreme Court of California's opinion as our argument herein in *People v. Burke,* 61 A. C. No. 14, August 21, pages 633, 636:

> "It does not appear that the police officers had a search warrant, and in the absence of such a showing we must conclude that they did not have one. (*Cf. Mapp v. Ohio* (1961), 367 U. S. 643, 645 (81 S. Ct. 1684, 6 L. Ed. 2d 1081, 1084, 84 A. L. R. 2d 933, 938).) (1) Where officers are not responding to an emergency there must be compelling reasons and exceptional circumstances

to justify a search in the absence of a search warrant. (*McDonald v. United States* (1948), 335 U. S. 451, 454-455 (69 S. Ct. 191, 93 L. Ed. 153, 158).) One exception established in the law is the right to make a search without a warrant as an incident to a lawful arrest. (*United States v. Rabinoqitz* (1950), 339 U. S. 56, 60-61 (70 S. Ct. 430, 94 L. Ed. 653, 657); *In re Dixon* (1953), 41 Cal. 2d 756, 761-762 (264 P. 2d 513).) The courts have recognized a distinction between a search of a building and a search of an automobile. (2) Generally, there can be no search of a house without a search warrant except as an incident to a lawful arrest therein, and probable cause to believe that an article sought is concealed in the house furnishes no justification for a search of that place without a warrant. (*Chapman v. United States* (1961), 365 U. S. 610, 613 (81 S. Ct. 776, 5 L. Ed. 2d 828, 831); *People v. Shelton* (1964), 60 Cal. 2d 740, 744 (36 Cal. Rptr. 433, 388 P. 2d 665).) With respect to automobiles the courts have pointed out that it is not always practicable to obtain a warrant for search of a vehicle which can quickly be moved out of the locality, and, therefore, in some instances a search without a warrant will be justified by probable cause to believe that an automobile contains articles which by law are subject to seizure. (*Carroll v. United States* (1925), 267 U. S. 132, 149-153 (45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790); see *Chapman v. United States, supra*, 365 U. S. 610, 615 (81 S. Ct. 776, 5 L. Ed. 2d 828, 833).)

"*Preston v. United States* (1964), 376 U. S. 364, ... (84 S. Ct. 881, 882 et seq., 11 L. Ed. 2d 777, ...) involved a factual situation very similar to the one before us. In *Preston* the city police arrested several men who were in a parked automobile and, at the time, searched them but not the car. After the car was taken to a garage and the men were booked at a police station, the police searched the car and found various articles which could be used in the commission of a crime. One of the arrested men confessed that he and some other persons intended to rob a bank, and the articles were turned over to the Federal Bureau of Investigation. During trial in a federal district court for conspiracy to rob a bank the articles were admitted in evidence over objection made on the basis of the Fourth Amendment. The judgment of conviction was reversed on the ground that the search was too remote in time or place to have been made as incidental to the arrest and failed to meet the test of reasonableness under the Fourth Amendment.

"(3) It must be determined in each case whether the facts fall within any of the exceptions to the constitutional rule that a search warrant must be had before a search may be made. (4) The right to make a contemporaneous search without a warrant upon lawful arrest extends to things under the accused's immediate control and, to an extent depending upon the circumstances, to the place where he is arrested. This is justified, for example, by the need to seize weapons which might be used to assault an officer as well as by the need to pre-

vent the destruction of evidence of the crime. These justifications are ordinarily absent, however, if the accused is in custody and the search is remote in time or place from the arrest (*Preston v. United States, supra,* 376 U. S. at p. .... (84 S. Ct. at p. 883, 11 L. Ed. 2d at p. ....).)

"(5) The search made of the interior of defendant's car at the time and place of arrest was lawful as a search incidental to arrest, but the search of the trunk was too remote in time and place to be so treated. The search of the trunk without a warrant was unlawful, and the evidence obtained as a result was improperly admitted."

II.

Subsidiary to the Principal Question of Search and Seizure Is the Question of Whether or Not There Was a Voluntary Consent Given by Petitioner to the Search by the Officers.

The officer's explanation is not a reasonable one. The petitioner had his hands on top of the car and when he was asked concerning the search of the car he replied that the keys were in the ignition lock, or words to that effect. The officer took the keys and searched the trunk of the car.

The courts have repeatedly held that consent to search must be free and voluntary and not as a result of compulsion. Otherwise, it will not be regarded as "consent".

See:

People v. Michael, 45 Cal. 2d 751;

United States v. DiRe, 332 U. S. 581.

In the *Havens* case, *supra*, 59 Cal. 2d 713, the officer testified that the defendant gave his consent to the search, but the defendant denied it, as here. The court stated, on page 719:

> "A search and seizure made pursuant to consent secured immediately following an illegal entry or arrest, however, is inexplicably bound up with the illegal conduct and cannot be segregated therefrom."

In the *Michael* case just referred to, 45 Cal. 2d 751, the court stated, on page 753, quoting from *United States v. DiRe*, 332 U. S. 581:

> "To protect his right to object to an unreasonable search or seizure, a defendant need not forcibly resist an officer's assertion of authority to enter his home or search it or his person."

Petitioner, with his hands on top of an automobile and having been "patted down" by the officers, and in effect searched, was in no position to resist the search of the trunk nor to give permission. It is hardly likely that he knowing that the contents of the trunk were incriminating would have voluntarily given consent to search the trunk. He certainly was in no position to resist such a search.

May we also add that any possibility of danger to the officers by reason of the use of weapons had long since passed, because they had fully examined both the petitioner Thomas and his co-defendant.

Conclusion.

We respectfully urge that this Petition for Certiorari should be granted, especially in view of this Court's strong stand against unlawful searches and seizures and its recent decisions *Mapp v. Ohio*, 367 U. S. 643; *Malloy v. Hogan*, 378 U. S. 1; *Ker v. California*, 374 U. S. 23; *Stoner v. California*, 11 L. Ed. 856; and the impact that such a review by this court would have upon the fair enforcement of the exclusionary rule in California, especially in view of the all-important decision of *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner.

EXHIBIT "A".

APPENDIX "A".

(Certified for nonpublication.)

In the District Court of Appeal of the State of California, Second Appellate District, Division Four.

The People, Plaintiff and Respondent, vs. Clifford Junior Thomas, Defendant and Appellant. 2d Crim. 9030.

Filed June 22, 1964.

Appeal from a judgment of the Superior Court of Los Angeles County, Joseph A. Wapner, Judge.

Affirmed.

Prosecution for violation of Dangerous Weapons' Control Law. Judgment of conviction affirmed.

Kenneth Foley, under appointment of District Court of Appeal, for Defendant and Appellant.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General, George A. Roth, Deputy Attorney General, for Plaintiff and Respondent.

Defendant was charged in a two-count information with violation of section 12090 of the Penal Code, obliteration of identification marks on a revolver, and with violation of section 12021, possession of a revolver by a person previously convicted of a felony, to wit, burglary in the state of Washington on September 2, 1953. On the People's motion, defendant's case was consolidated with the case of William Jay Gallagher for trial. The trial commenced as a jury trial, but at the conclusion of the People's case both defendants and all counsel waived trial by jury. The

jury was thereafter discharged, it being stipulated that "the court may consider the evidence heretofore given before the jury." Defendants were found guilty as charged. Codefendant Gallagher does not appeal. Motions by Thomas for new trial and probation were denied and he was sentenced to the state prison for the term prescribed by law, the sentences on each count to run concurrently. He appeals from the judgment of conviction and the order denying his motion for a new trial. (The latter order is nonappealable. Pen. Code Section 1237.)

On February 25, 1962, while on patrol in a police squad car, Officers Dillon and Dankworth were alerted by a radio call to be on the lookout for robbery suspects who were seen in the vicinity of Burbank and Whitsett Streets, driving a "white and brown De Soto automobile, bearing license plate No. W46096." When the officers reached this area they observed a car with the same license and coloring described by the radio message. The car was moving southbound on Whitsett, approaching Burbank. The officers stopped the car. Appellant was driving and codefendant Gallagher was a passenger. The officers approached the car and proceeded to question the occupants. Neither officer had his gun drawn. Appellant said he was looking for a girl friend's house; a girl he knew lived in the area; they had just arrived in Los Angeles from Reno, Nevada; they had stopped at a market at Burbank and Whitsett Streets to purchase some cheese and crackers which they ate while sitting in the car.

Thomas and Galllagher were then ordered out of the car, directed to place their hands on the top of the vehicle and "patted down" for weapons. In approx-

imately three minutes, two other officers arrived at the scene. Officer Dillon asked appellant if he could look through the vehicle. Appellant replied, "Sure, go ahead." Officer Dillon observed a pair of binoculars on the right front seat and two two-way walkie-talkie radios in the glove compartment. In the trunk of the car, in the space between the spare tire and the fender well, he found two socks, each containing a revolver. One of the revolvers was loaded. Dillon observed that the serial number had been removed from one of the revolvers. The trunk also contained ammunition which fitted the guns found and numerous tools and gloves, which, according to the officer, were the types used by burglars. Appellant stated that everything in the car belonged to him.

Defendant testified in his own behalf on the limited issue of probable cause. He was in the vicinity of Whitsett and Burbank Streets, driving a De Soto car bearing the Nevada license No. W46096, when he was stopped by police; codefendant Gallagher was a passenger at the time; they were ordered out of the car and were searched at gunpoint. One of the officers asked him for the car keys. He told the officer the keys were in the ignition; the officer then searched the car; he did not give the officer permission or consent to make this search.

Codefendant Gallagher testified that he did not hear any officer ask appellant for consent to search the automobile.

On cross-examination both defendants admitted they had suffered prior felony convictions for burglary.

Andrew Marudas, called by the defense on the issue of probable cause, testified that, at approximately 7:30

in the evening on February 25, he observed defendant's De Soto automobile parked in a lot adjacent to the Alpha Beta Market, located at Burbank and Whitsett Streets. The car was parked over 150 feet away from any other vehicle. The Alpha Beta Market was closed. Marudas went into Peppers Market which was located across the street, and remained there for approximately ten minutes. As he left the market, he observed the De Soto start up with the lights out, back up and go north about 150 to 200 feet to the back of the lot, where it was parked near three or four other cars. Marudas went into a telephone booth across the street, called the Peppers Market and talked to the manager Mr. Edwards. He told him that there was a car across the street which looked suspicious and that he should come out and investigate it. When Mr. Edwards came out of the market and approached the car, the vehicle was driven off the lot, through an alley, around the block and back onto the lot, where it stopped momentarily and then was driven off again. Mr. Edwards then called the police. Just before their arrival, approximately 10 minutes later, Marudas saw the De Soto drive by again. He advised the police the direction in which the De Soto had driven. The police car took pursuit and stopped the De Soto approximately 200 feet from the lot.

Defendant contends that the revolvers found in the trunk of his car were the product of an unlawful search and seizure. We disagree. The officers were fully justified, after observing that appellant was driving the automobile referred to in the official alert, in stopping him for questioning and, indeed, would have been derelict in the performance of their duty had they not

done so. Further, under these circumstances, to conduct a "pat down" for weapons was entirely reasonable. (*People v. Mickelson,* 59 Cal. 2d 448, 450-454.) Thereafter, according to the testimony of two of the arresting officers, appellant freely consented to the search of the car. Though the testimony of appellant and codefendant on this factual issue contradicted that of the officers, the trial court resolved the conflict in the People's favor. "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances." (*People v. Michael,* 45 Cal. 2d 751, 753.) The fact that appellant had been stopped and was being questioned by police officers at the time the consent was given, is not, in itself, determinative of the question of whether the consent was voluntary. (People v. Cowman, ... Cal. App. 2d ...., ...[1]; People v. Ruhman, ... Cal. App. 2d ...., ...[2]) We believe that the evidence in the instant case amply supports the trial court's determination. In so holding we need not decide whether, absent consent to search, there was probable cause for the search of the automobile.

Defendants contend that the trial court committed reversible error in allowing a police officer to testify that in his opinion the tools found in the trunk of defendant's automobile were burglar tools. Assuming, arguendo, the court erred in admitting this testimony, the error was not prejudicial. Defendant's guilt was overwhelmingly established by the other evidence introduced. Article 6, section 4½ of the California Con-

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[1]223 A. C. A. 110, 119.

[2]224 A. C. A. 387, 391.

stitution in part reads as follows: "No judgment shall be set aside . . . in any case, *on the ground of . . . the improper admission or rejection of evidence . . . or for any error as to any matter of procedure,* unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Emphasis added.)

"(A) 'miscarriage of justice should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing part would have been reached in the absence of the error." (*People v. Watson,* 46 Cal. 2d 818, 836.)

The judgment of conviction is affirmed and the purported appeal from the order denying defendant's motion for new trial is dismissed.

Jefferson, *J.*

We concur:

Burke, *P. J.*

Kingsley, *J.*

Certified for nonpublication in the Official Reports pursuant to Rule 976.

Burke, *P. J.*

Jefferson, *J.*

Kingsley, *J.*